

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUL - 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Cellular Service and Other Commercial
Mobile Radio Services in the Gulf of
Mexico

WT Docket No. 97-112

Amendment of Part 22 of the
Commission's Rules to Provide for Filing
and Processing of Applications for
Unserved Areas in the Cellular Service and
to Modify Other Cellular Rules

CC Docket No. 90-6

DOCKET FILE COPY ORIGINAL

COMMENTS OF BACHOW/COASTEL, L.L.C.

Richard Rubin
Robert E. Stup, Jr.
FLEISCHMAN AND WALSH, L.L.P.
1400 16th Street, N.W.
Sixth Floor
Washington, D.C. 20036
(202) 939-7900
Attorneys for Bachow/Coastel L.L.C.

July 2, 1997

No. of Copies rec'd 028
List ABCDE

TABLE OF CONTENTS

	<u>PAGE NO.</u>
SUMMARY	i
I. BACKGROUND	2
A. Introduction	2
B. The Court Remand	8
C. The Commission's Response To The Remand	10
II. COMMENTS	13
A. The Commission's Notice Proposals Fail To Consider The Special Circumstances Under Which Gulf Carriers Provide Cellular Service And To Justify Its Proposal	13
1. The Commission's Proposal Will Gradually Replace Gulf-Based Service to the Coastal Zone With Land-Based Service	18
2. Gulf-Based CTS Carriers Must Be Permitted To Locate Transmitters On Land Without Consent Of The Co-Channel Land-Based CTS Licensee	24
3. The Commission's Past <u>De Minimis</u> Extension Rules Have Provided A Competitive Advantage To Land-Based CTS Carriers	28
4. The Commission's Proposal Of A Uniform Propagation Methodology For SABs Over Water Should Not Be Adopted	29
5. The Commission Must Ensure That Gulf-Based Carriers Are Able To Interconnect With The Land-Based Carriers That Border The Gulf	30
B. The Commission's Reference To The "Public Interest" Does Not Justify Its Proposal To Bifurcate The Gulf	31

SUMMARY

Almost three years after the U.S. Court of Appeals for the District of Columbia Circuit remanded the Commission's previous attempt to modify its rules for regulation of cellular telecommunications service ("CTS") in the Gulf of Mexico (the "Gulf"), the Commission now attempts to address the remand issues in its *Second Further Notice of Proposed Rulemaking* in WT Docket No. 97-112 and CC Docket No. 90-6. However, the Commission's general proposal to bifurcate the Gulf into a Coastal Zone and an Exclusive Zone is not responsive to the Court's remand directive, is unfairly skewed in favor of the CTS licensees in the land-based cellular service markets adjacent to the Gulf and, ultimately, is unnecessary.

In 1994, the Court rejected the Commission's attempt to confine the two Gulf-based CTS carriers to their existing areas of actual reliable service. The Court agreed with the Gulf-based carriers that the Commission's rules confining the Gulf-based carriers to existing areas of actual reliable service were arbitrary and capricious. Finding the Commission's treatment of the differences between Gulf-based and land-based carriers to be "vexingly terse," the Court concluded that the Commission had failed to provide a reasoned explanation for its requirement that Gulf-based carriers adhere to the same standard for definition of service areas that it adopted for use by land-based carriers. The Commission's current proposals suffer from the same infirmity.

The Court clearly rejected the earlier Commission notion to freeze the existing Gulf-based CTS licensees into their current service area boundaries because of the Commission's failure to properly consider the effect of the unique characteristics of the Gulf on the ability of the Gulf-based CTS licensees to serve the Gulf. In its current proposal, the Commission not only freezes the existing Gulf-based CTS licensees into their current SABs within the so-called

Coastal Zone but assures the gradual erosion of their provision of cellular service within that zone by deleting any previously served areas that become “unserved” as a result of circumstances beyond their control. Those circumstances - the deactivation or move of the oil drilling platforms upon which the Gulf carriers are dependent for placement of their cellular transmitting equipment - were at the heart of the Court’s focus when it chastised the Commission for attempting to blindly apply the same regulatory scheme to the water-based Gulf CTS carriers that it was to apply to the land-based CTS carriers without considering the obstacles posed by the unique characteristics of the Gulf.

The Commission’s effort to satisfy the Court’s concern by explaining that the existing Gulf-based carriers would continue to have flexibility within the so-called “Exclusive Zone” entirely ignores what the Commission is doing to the Gulf-based carriers in an area of the Gulf such carriers are currently authorized to serve, i.e., the proposed Coastal Zone. Rather than considering the special circumstances of providing CTS in the Gulf and the fairness of the Commission’s treatment of existing Gulf carriers in light of these unique characteristics, the Commission attempts to use this rulemaking to make a de novo general public interest determination with respect to how best to provide CTS in the Gulf. This is not what the Court’s remand contemplates or requires.

Equally devastating is the degree to which the Commission’s proposals uniformly use the unique characteristics of the Gulf against the Gulf-based CTS licensees. The proposals are skewed to result in the gradual annexation of the coastal waters by land-based CTS carriers in the markets adjacent to the Gulf. The Commission’s proposed rules will have the unintended result of gradually replacing Gulf-based cellular service to the Coastal Zone with land-based

cellular service. These proposed rules “tilt the table” in favor of the land-based carriers to such a degree that the land-based carriers will have the incentive and ability to replace Gulf-based carriers as the CTS service providers within the Coastal Zone.

Under the Commission’s proposal, any time a carrier leaves an area of the Coastal Zone unserved, the area will be subject to Phase II unserved area applications. Although this proposed rule appears to impact equally the land-based and Gulf-based carriers in reality it does not. The nature of Gulf-based operations requires that transmitters be located on oil rigs and other non-permanent structures. The movement of these structures is not controlled by the Gulf-based carriers. As a result, and as clearly recognized by the Court, Gulf-based carriers are at the mercy of platform owners. When a platform is moved, the Gulf-carrier’s cellular transmitter must also move. The land-based CTS carriers may be subject to the same rule but not to the same vulnerability. Put simply, the transmitter sites of land-based CTS carriers are not nearly as fluid. Thus, as the Gulf-based carriers lose previously served area within the so-called Coastal Zone, the land-based carriers retain their coverage within that zone. Moreover, as a result of the proposed rules, the land-based carriers can simply wait until the Gulf-carrier must dismantle its cell site due to rig relocation and then file an unserved area application. Since the newly “unserved” area would have been created by the lack of a platform for the affected Gulf-based carrier to use as a transmitter site, that carrier will be equally unable to file a competing unserved area application. As a result, the entire Coastal Zone could eventually be served by land-based carriers.

Moreover, by proposing to change from its “no land-based transmitter site without consent of the affected land-based CTS carrier” to a land-based transmitter site only with the

consent of the affected land-based CTS carrier,” the Commission accomplishes nothing. This change has no tangible benefit to Gulf-based carriers. Faced with a choice between consenting to a land-based transmitter site for a Gulf carrier and filing its own unserved area application to serve the area itself, the land-based CTS carrier will continue to have no incentive to give its consent. By allowing Gulf-based CTS carriers to place cellular transmitters on land under virtually any set of reasonable conditions, the Commission would be addressing the impact on Gulf-based CTS carriers of the unique characteristics of the Gulf that the Court found so important in its remand decision. Failure to do so in the context of the Commission’s proposal to bifurcate the Gulf simply provides the land-based CTS carriers with the benefit of the unique characteristics of the Gulf.

Despite the Commission efforts to freeze the processing of applications by the land-based carriers for extensions into the Gulf, the Commission’s proposal fails to address the fact that past de minimis extension rules have provided a still considerable competitive advantage to land-based CTS carriers. The Commission’s proposal, which provides for the inclusion in each carrier’s CGSA of those parts of the Coastal Zone presently covered by extensions allows land-based carriers to unfairly benefit from an earlier set of rules that favored them over the Gulf-based carriers.

The Commission’s proposal for a uniform propagation methodology for SABs over water is also skewed in favor of land-based CTS carriers. Since it is universally acknowledged that signals carry further over water than over land, any uniform methodology adopted will favor land-based carriers. If the current Gulf formula is used for those parts of land-based SABs that are over water, the extensions of the land-based carriers into the Coastal Zone will be greater for purposes of determining whether there are unserved areas. If a different formula is adopted

and applied to the Gulf carriers, their extensions into the Coastal Zone will shrink, while those of the land-based carriers will increase.

Furthermore, the Commission must ensure that the unique characteristics of the Gulf-based carriers are not used by the land-based carriers to force the Gulf-based carriers into an unfavorable interconnection arrangement. Because there is no local landline telephone exchange carrier in the Gulf with whom the Gulf-based carriers can interconnect, the Gulf-based carriers have no choice but to interconnect with the landline telephone companies in the cellular markets adjacent to the Gulf. Some of these same landline telephone companies operate the CTS systems that border on the Gulf. These landline telephone companies refuse to provide interconnection to the Gulf-based carrier on a transport and termination basis. Instead these companies insist on treating the Gulf-based carriers as interexchange carriers subject to access charges. Due to the Commission's failure to act on this issue the Gulf-based carrier have been unable to obtain less expensive, more traditional CMRS/LEC interconnection.

Finally, the Commission's proposal to carve a Coastal Zone out of the Gulf-carriers' CGSAs in an attempt to meet a perceived unmet demand for CTS in the coastal region of the Gulf is ultimately unnecessary. The vast majority of the Coastal Zone bordering the States of Texas, Louisiana, Mississippi, and Alabama is currently served by the Gulf-based carriers. Pursuant to the Commission's rules an "unserved area" must consist of a minimum of 50 square miles. In fact, there are few, if any, unserved areas in the proposed Coastal Zone bordering these states that is available for licensing under the Commission's proposal. While there is significant unserved area off the coast of Florida, this is the result of the unique characteristics of the Gulf that the Commission must -- and fails -- to address with its proposals in a manner that facilitates the provision of cellular service to those areas by the Gulf-based carriers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Cellular Service and Other Commercial
Mobile Radio Services in the Gulf of
Mexico

WT Docket No. 97-112

Amendment of Part 22 of the
Commission's Rules to Provide for Filing
and Processing of Applications for
Unserved Areas in the Cellular Service and
to Modify Other Cellular Rules

CC Docket No. 90-6

COMMENTS OF BACHOW/COASTEL, L.L.C.

Bachow/Coastel, L.L.C. ("Coastel"), by its attorneys, herein comments on the Commission's proposals in its *Second Further Notice of Proposed Rulemaking* ("Notice") in the above-captioned docket.¹ As discussed below, Coastel suggests that the Commission's proposal to bifurcate the Gulf of Mexico (the "Gulf") service area for cellular telephone service ("CTS") into a Coastal Zone and an Exclusive Zone is not responsive to the United States Court of Appeals for the District of Columbia Circuit's remand directive in Petroleum Communications, Inc. v. FCC,² is unfairly skewed in favor of the CTS licensees in the cellular telephone service markets adjacent to the Gulf, and ultimately, is unnecessary.

¹Cellular Service, *Second Further Notice of Proposed Rule Making*, WT Docket No. 97-112, CC Docket No. 90-6 (rel. April 16, 1997).

²Petroleum Communications, Inc. v. FCC, 22 F.3d 1164 (D.C. Cir. 1994).

I. BACKGROUND

A. Introduction

Coastel is the B Block licensee of a CTS system in the Gulf.³ Coastel acquired its cellular system from RVC Services, Inc. d/b/a Coastel Communications Company ("RVC"), in June of 1996, pursuant to Commission approval.⁴ RVC had been the licensee of the system since 1989.⁵ Gulf Cellular Associates, Inc. had been the licensee since 1985, when the license was first issued by the Commission.⁶

In 1981, the Commission adopted its initial rules for the implementation of land-based cellular systems.⁷ In 1983, Petroleum Communications, Inc. ("PetroCom") filed an application with the Commission requesting developmental authority to operate a cellular system in the Gulf. The Commission rejected PetroCom's request but determined that it was in the public interest

³Call Sign KNKA412 in Market 306B-Gulf of Mexico Service Area.

⁴RVC Services, Inc., d/b/a Coastel Communications Company and Bachow/Coastel, L.L.C., Order, 11 FCC Rcd 12136 (CWD 1996).

⁵In 1990, Mobile Management Corporation ("MMC") was named trustee and interim owner of the license, pursuant to Commission approval, after RVC defaulted on a bridge loan from Mitsubishi Electric America, Inc. that had been used to purchase the license. On October 1, 1990, the Commission granted its consent to an application for transfer of control of RVC to MMC from its existing owner. See File No. 06217-CL-TC-1-90. Common Carrier Public Cellular Radio Service Information, Public Notice, Report No. CL-91-5 (Oct 4, 1990).

⁶Petroleum Communications, Inc., Memorandum Opinion and Order, 1985 FCC LEXIS 2798 (CCB 1985).

⁷Cellular Communications Systems, 86 FCC 2d 469 (1981), modified, 89 FCC 2d 58 (1982), further modified, 90 FCC 2d 571 (1982), petition for review dismissed sub nom. United States v. FCC, No. 85-1526 (D.C. Cir. 1983).

to license cellular carriers to provide CTS in the Gulf.⁸ Accordingly, the Commission designated the Gulf as Metropolitan Statistical Area ("MSA") No. 306, and announced that it would receive applications for authority to provide CTS service in the Gulf and that it would consider PetroCom's developmental authority request to be such an application. The Commission also granted to PetroCom a waiver of § 22.2 of its rules, allowing PetroCom to serve fixed and temporary-fixed platforms, in addition to mobile units.⁹

In the same order, the Commission determined that it would allow Gulf carriers to provide service via land-based transmitters, but it would condition any grant of authority on noninterference with land-based cellular systems.¹⁰ Likewise, land-based carriers would be required to avoid interfering with Gulf systems.

On reconsideration of the Commission's decision to license Gulf carriers and to accept PetroCom's original request as an application to provide Gulf service, the Commission rejected an argument that PetroCom's proposed incursions into neighboring MSAs rendered its application blatantly defective and unacceptable for filing.¹¹ The Commission responded that if

⁸Petroleum Communications, Inc., *Memorandum Opinion and Order*, 54 RR 2d (P & F) 1020 (1983).

⁹Commission rules at the time required that cellular service be provided only to mobile stations. Section 22.2 defined a mobile station as "[a] station in the mobile service intended to be used in motion or during halts at unspecified points." Id. at ¶ 21 n.15.

¹⁰"Furthermore, for proposed sites in the Gulf, we will require interference-free operation to land-based sites and coordination of proposed frequencies with operators whose base stations are within 150 miles of the offshore operator's proposed coverage area." Id. at ¶ 20.

¹¹Petroleum Communications, Inc., *Memorandum Opinion and Order on Reconsideration*, 56 RR 2d (P & F) 1651, ¶¶ 12-13 (1984).

it found the proposed incursions to be unjustified, “[a]t most, we will require PetroCom to re-engineer its proposal.”¹² The Commission noted that land transmitters facilitate coverage of coastal areas, particularly in swamp areas; that they are less expensive to operate and maintain than are offshore sites; and that they provide a less expensive interconnect with adjacent wireline systems.¹³

In a 1985 order, the Common Carrier Bureau (“Bureau”) defined the Gulf Cellular Geographic Service Area (“CGSA”) as the water areas beginning at the “coastline.”¹⁴ In that order, the Bureau clarified that a Gulf licensee could offer only incidental service outside of the Gulf CGSA and that its 39 dBu contours could extend over the coastline by only a de minimis amount.¹⁵ Despite the previous Commission ruling that permitted Gulf carriers to use land transmitters, the Bureau determined that Gulf carriers would be able to place their transmitters on land for only a six-month period, at the end of which the Gulf carriers would have to remove them.¹⁶ The Bureau also granted PetroCom a waiver of its rules requiring that PetroCom provide reasonable assurance of site availability finding that the unique circumstances of

¹²Id. at ¶13 n.16.

¹³Id.

¹⁴Petroleum Communications, Inc., Memorandum Opinion and Order, 1985 FCC LEXIS 2798 (CCB 1985). “Coastline” was defined in accordance with U.S. v. Louisiana, 363 U.S. 1, 66-67 n.108 (1960) (“the term ‘coast’ denotes the line of the shore plus the line where inland waters meet the open sea”). Id. at ¶ 21. In the same order, the Commission granted to PetroCom and Gulf Cellular Associates authority to provide cellular service in the Gulf. Id.

¹⁵Id. at ¶ 22.

¹⁶Id. at ¶ 25(b).

providing service in a body of water such as the Gulf, i.e., identification of cellular antennas located in a body of water, justified grant of the waiver.¹⁷

In its 1986 reconsideration of the Bureau's order defining the Gulf CGSA, the Commission renamed that area the Gulf of Mexico Service Area ("GMSA") and clarified the definition of "coastline" to include all harbors, bays and islands along the circumference of the Gulf.¹⁸ Specifically, coastline was defined in accordance with the Submerged Lands Act, 43 U.S.C. 1301, as "the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters."¹⁹ The Commission also reversed its earlier decision and determined that it would not allow Gulf carriers to erect land transmitters on even a temporary basis;²⁰ land transmitters would only be permissible by agreement of the land-based carrier in whose CTS market the transmitter was to be located.

¹⁷"To receive a waiver of the Commission's Rules, an applicant must show 'that the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.' Id. at ¶ 11 (citing § 22.19(a)(1)(ii) of the Commission's Rules).

¹⁸Petroleum Communications, Inc., Order on Reconsideration, 1 FCC Rcd 511 at ¶ 16 (1986). Specifically, all harbors and bays along the Texas, Louisiana, Alabama, Mississippi, and Florida coasts fall outside of the GMSA, as do the islands along the circumference of the Gulf, including the Chandeleur Islands and those surrounding the Mississippi Sound.

¹⁹Id.

²⁰The Commission determined that it would not serve the public interest to allow Gulf carriers to erect land-based transmitters on a temporary basis since any areas served via those transmitters would ultimately be left without service at the end of the six month period. Id. at ¶ 20.

In its 1987 reconsideration of its November 1986 decision, the Commission again rejected PetroCom's request to use land-based transmitters.²¹ In support of its decision the Commission cited a need to protect future service areas, including yet-to-be licensed Rural Service Areas ("RSAs").

The only distinction between early orders concerning Gulf cellular service and the recent order now appealed by PetroCom is that potential RSA licensees were not then included in our immediate consideration. . . . Once a complete licensing program is taken into consideration, including Rural Service Area licensees, it becomes apparent that our concern that land systems be free from Gulf system interference must include all land areas.²²

The Commission further explained that once it took into account RSA licensees, it "became impossible to justify land-based sites for Gulf operators."²³

In 1988, PetroCom requested Commission approval to expand its CGSA to the east and south of its existing CGSA, at the time, defined as the area extending from the Texas border with Mexico on the eastern Gulf side to Biloxi, Mississippi, with the coastline as its landward boundary. In an order granting PetroCom's request, the Bureau's now-defunct Mobile Services Division determined that there would be no restriction on incursions by land-based carriers into water areas not within the CGSA of a Gulf carrier; however, once an area was licensed, the land carrier would be required to provide interference-free service, changing its CGSA and 39 dBu

²¹Petroleum Communications, Inc., Order on Reconsideration, 2 FCC Rcd 3695 (1987).

²²Id. at ¶ 11.

²³Id. at ¶ 12 n.4.

contours, if necessary.²⁴ In contrast, Gulf carriers would not be permitted to extend their signals onto land, whether or not the area was licensed to another carrier.

In 1990, the Commission began its second phase of cellular licensing, in which it planned to accept applications for those areas that remained unserved by cellular carriers.²⁵ The Commission proposed rules for the acceptance, processing, and selection of applications for unserved areas. In a related *Further Notice of Proposed Rulemaking*, the Commission proposed a formula for determining the unserved area within each MSA, RSA, and the GMSA.²⁶ In 1992, the Commission adopted a formula for use by each licensee, including each Gulf licensee, in determining its service area.

Under the Commission's formula to determine their CGSAs, Gulf carriers, like land-based CTS carriers, would have been frozen into their then-existing service areas. This change represented a significant break from the consistent acknowledgments of the Bureau and the Commission that the unique characteristics of providing service within the Gulf warranted different regulatory treatment than for the land-based CTS markets.²⁷ However, the

²⁴Petroleum Communications, Inc., *Memorandum Opinion and Order*, 3 FCC Rcd 399 (MSD 1988).

²⁵Amendment of Part 22 of the Commission's Rules, *Notice of Proposed Rulemaking*, 5 FCC Rcd 1044, (1990).

²⁶Amendment of Part 22 of the Commission's Rules, *Further Notice of Proposed Rulemaking*, 6 FCC Rcd 6158 (1991).

²⁷Gulf carriers place their towers on the waterborne platforms of the oil and gas companies that they serve; when a platform is moved, the licensee's tower moves with it. As a result, the Gulf carriers' actual reliable service areas change frequently. Other differences include extra
(continued...)

Commission did adopt a separate methodology for calculating service areas within the GMSA, in order to take into account that the "field strength of electromagnetic radio waves when propagating over large bodies of water is attenuated less than when their path is over rolling terrain, such as contemplated by the Carey report."²⁸

The two Gulf CTS carriers, PetroCom and RVC appealed the Commission's decision to apply the same formula.²⁹ The carriers contended that § 22.903(a) of the Commission's new rules arbitrarily confined the GMSAs to existing areas of actual reliable service, thereby failing to take into account the unique circumstances faced by waterborne carriers. The Gulf CTS carriers argued that, based on the special circumstances under which they provide service, the Commission should continue to regulate Gulf carriers differently from their land-based counterparts.

B. The Court Remand

On appeal of the Commission's 1992 order, the Court of Appeals for the District of Columbia Circuit (the "Court") held that the Commission had arbitrarily and capriciously failed to justify its decision to delimit cellular radio service areas of the Gulf licensees and remanded the issue to the Commission with instructions to vacate the subject regulation, pending

²⁷(...continued)

costs associated with moving and accessing remote transmitter locations. Petroleum Communications, Inc. v. FCC, 22 F.3d at 1164. Moreover, cellular signals carry differently over water than over land. 6 FCC Rcd 6158 at ¶ 11.

²⁸In the Matter of Amendment of Part 22 of the Commission's Rules, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 7183, ¶ 4 (1992).

²⁹Petroleum Communications, Inc. v. FCC, *supra*.

reconsideration, insofar as it related to Gulf carriers. More specifically, the Court found that, in promulgating a uniform standard for water-based and land-based licensees, which had the effect of freezing the water-based licensees' service areas at the status quo, the Commission had silently glossed over the differences between water-based and land-based licensees.

We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently. But the converse is also true. An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties. The Commission itself recognized the significant differences between land-based and Gulf-based licensees prior to the instant rulemaking Despite the Commission's obvious, longstanding recognition of petitioners' unique plight, the *Third Report and Order* silently glosses over these differences, mandating that water-based and land-based licensees alike adhere to a uniform actual service area rule.³⁰

The Court determined that the Commission had failed to consider the special circumstances of Gulf carriers or to properly justify its break from a longstanding policy of treating Gulf carriers differently from land-based carriers. The Court held that the consequences of the Commission's new rule for Gulf licensees appeared to be dire:

Limited as [Gulf carriers] are to water-borne transmitters, petitioners go only where oil and gas sites permit. The new rule freezes petitioners' service areas as the status quo. When oil and gas rigs are deactivated, petitioners must close up shop. If new rigs do not open within reasonable proximity to the old, petitioners effectively lose the ability to serve part or all of their service areas.³¹

³⁰Petroleum Communications, Inc. v. FCC, 22 F.3d at 1172-1173 (citations omitted).

³¹Id. at 1173.

The Court concluded that the Commission had overlooked the critical point, that “*given* the inability of Gulf licensees to place transmitters on land, Gulf service areas should not be frozen at their current dimensions.”³² Using the “arbitrary and capricious” standard, the Court remanded the issue back to the Commission for full reconsideration. The Commission’s recent *Notice* is designed to respond to the issues raised by the Court in its remand order.

C. The Commission’s Response To The Remand

The Commission has proposed to divide the GMSA into two zones, subject to different regulations: the GMSA Coastal Zone and the GMSA Exclusive Zone. The Commission has defined the Coastal Zone in terms of the United States territorial waters using a set of coordinates that create a maritime zone that extends approximately twelve nautical (13.82 statute) miles from the United States baseline.³³ The Exclusive Zone is defined as “the body of water that extends from the Coastal Zone . . . to the southernmost boundary of the GMSA” that, by Presidential Proclamation, is described as being 200 nautical miles from the baseline.³⁴

The Commission proposes that the Coastal Zone be the subject of Phase II Unserved Area Applications.³⁵ That is, to the extent that there are “unserved areas” within the Coastal Zone, they could be the subject of Phase II applications pursuant to Sections 22.949 and 22.951

³²Id. (italics in original).

³³*Notice* at ¶ 32.

³⁴Id. at ¶ 46. The extent of the Exclusive Zone depends upon international agreements.

³⁵Id. at ¶ 36.

of the Commission's rules.³⁶ Any current extensions into the Coastal Zone, by either Gulf or land-based carriers, would be included as part of that carrier's CGSA, until such time as the area is "vacated," i.e., no longer reliably served by the carrier.³⁷ Once vacated, that portion of the Coastal Zone would be available for re-licensing pursuant to unserved area licensing procedures.³⁸ All contours within the Coastal Zone would be depicted using the same formula regardless of whether such contours are from Gulf-based carriers or land-based carriers.³⁹ The Commission did not propose a specific formula. The Commission further proposed to provide that its Service Area Boundary ("SAB") extension rules would apply to all transmitters, regardless of whether they are water-based or land-based.⁴⁰ Under the Commission's proposal, the Exclusive Zone would be the area within which only the existing Gulf carriers could provide service.

Commission approval would not be required for service area modifications within the Exclusive Zone and unserved areas would not be subject to re-licensing.⁴¹ The Commission proposed that such carriers would be required to notify it of any changes in their service areas

³⁶All Phase II applications previously filed to serve any Coastal Zone areas would be dismissed without prejudice to being re-filed, along with any other Phase II applications, within 60 days after the effective date of the new rules. All mutually exclusive situations would be resolved by auction. Id. at ¶ 54.

³⁷Id.

³⁸Id. at ¶ 36.

³⁹Id. at ¶ 38.

⁴⁰Id. at ¶ 40.

⁴¹Id. at ¶ 46.

by filing an FCC Form 489 notification within 15 days of the modification. The Commission further proposed that SAB extension rules would apply to all future extensions into the Exclusive Zone.⁴² The CGSA of the existing Gulf carriers would be determined in accordance with Section 22.911(a)(2) of the Commission's Rules to include the Exclusive Zone and those parts of the Coastal Zone that they continue to serve.⁴³

During the rulemaking, the Commission will continue to hold all land-based carriers' pending applications proposing extensions of any kind into the GMSA, to be dismissed at the conclusion of the proceeding.⁴⁴ The Commission proposed to remove its prohibition against the Gulf carriers' use of land-based transmitters without consent of the land-based licensee and to treat in accordance with its Section 22.912 SAB extension requirements Gulf-based CTS carriers' land transmitter applications.⁴⁵ The Commission also stated that it would rule on eleven Coastel Applications for Review requesting Commission reconsideration of its denial of "land-based" transmitter applications.⁴⁶

⁴²Id. at ¶ 45.

⁴³Id. at ¶ 47.

⁴⁴Id. at ¶ 55.

⁴⁵47 C.F.R. § 22.912.

⁴⁶*Notice* at ¶ 57.

II. COMMENTS

A. The Commission's *Notice* Proposals Fail To Consider The Special Circumstances Under Which Gulf Carriers Provide Cellular Service And To Justify Its Proposal.

The Commission's proposal represents a fundamental misunderstanding of the Court's remand order. The Commission attempts to use the unique characteristics of the Gulf to make a public interest determination with respect to how to best provide cellular service in the Gulf. The Commission thus approaches the matter in a vacuum, as if it were approaching the issue for the first time. However, this is not what the Court's remand order required. The Court's concern was with the fairness of the Commission's treatment of the existing Gulf carriers in view of the unique obstacles they face in providing cellular service in the Gulf. The Commission's proposal ignores the Court's fairness concerns and instead attempts to "reinvent the wheel." As such, the Commission's proposal is nonresponsive and, if adopted, will likely be equally, if not more, troubling to the Court.

As the Commission states, the *Notice* is intended to address the Court's 1994 remand.⁴⁷ In that remand, the Court chastised the Commission because it failed to consider the effect of the unique characteristics of the Gulf on the ability of the existing Gulf carriers to provide CTS in the Gulf. More specifically, the Court found that the Commission's effort to freeze the Gulf carriers into their current cellular service areas failed to consider the fact that Gulf carriers are at the mercy of oil drilling platforms which, unlike land-based transmitter sites, may move or

⁴⁷Id. at ¶ 2.

be deactivated on a fairly regular basis.⁴⁸ The Court instructed the Commission to regulate the Gulf carriers in a manner that allows them flexibility to overcome the obstacles posed by the unique characteristics of the Gulf. Instead, the Commission has proposed to corral the Gulf carriers into a so-called "Exclusive Zone" 12 nautical miles away from the coastline and to freeze the Gulf carriers into their service areas in a so-called "Coastal Zone," within 12 nautical miles of the coastline, with the added notion that when those carriers lose any coverage in the "Coastal Zone" because of the move or deactivation of a serving oil drilling platform, the lost coverage area will be deleted from their cellular service area. Thus, rather than provide the required regulatory flexibility to allow the existing Gulf carriers to overcome the obstacles posed by the unique characteristics of the Gulf, the Commission has sought to revisit the entire issue of how to best license CTS in the Gulf.

Unfortunately, the Commission's improper approach to the remand has encouraged land-based carriers who filed comments on June 2 to take the *Notice* as an invitation to conduct a completely *de novo* review of how to best provide cellular service to the Gulf. However, the issue is not whether a Gulf-based or land-based cellular carrier is best suited to provide cellular service in any part of the Gulf or whether one or the other would provide more or less expensive cellular service. Any solution to the problems facing the provision of cellular service in the Gulf must, as a given, accept (a) the fact that the Commission has already established the Gulf as a whole as a separate cellular market, (b) that there are two carriers licensed to provide CTS in the Gulf; and, most importantly, (c) that the Court's primary concern was the Commission's

⁴⁸Petroleum Communications, Inc. v. FCC, 22 F.3d at 1167.

failure to provide those carriers with the regulatory flexibility necessary to overcome the obstacles posed by the unique characteristics of the Gulf.

At the time that it first licensed the CTS carriers in the Gulf, the Commission recognized that the licensing of a water-based CTS system required different regulatory considerations. The Commission anticipated some difficulties along the boundary between Gulf-based systems and adjacent land-based systems. To be sure, the different propagation characteristics of radio waves over water have made frequency coordination, contour extension and subscriber capture issues between Gulf-based and land-based carriers more difficult than as between land-based carriers. The lack of a definitive boundary between the Gulf and the adjacent land markets has undoubtedly contributed to the tension. The Commission nonetheless applied the same rules that govern operational relationships between co-channel systems in adjacent land-based markets.

Attempts at de minimis extensions have been hotly contested by both land-based and Gulf-based carriers. Most of these disputes arose under a now defunct definition of de minimis which allowed the contesting licensees to present highly subjective arguments concerning what the extending portion of a cell contour was actually covering and whether the extending carrier could have accomplished its coverage aims within its own market without the extension. These arguments also contested the size of the extension against an evolving ad hoc "extension size" standard being developed and refined in the caselaw. Since 1994 the Commission has not acted on any application filed by a land-based carrier that proposes an extension of any size into the Gulf.⁴⁹ A change in the Commission's approach to extensions, effective in January, 1995

⁴⁹Notice at ¶ 55.

moots these arguments since an SAB is not permitted to extend into another licensee's CGSA without that licensee's consent. Thus, the main question in the case of a non-consensual extension is whether it overlaps the CGSA of the co-channel CTS carrier in that market. The issue is no longer the quantity or quality of the extension. In the Gulf, the situation is complicated by the uncertainty over the boundary between the Gulf market and the adjacent land markets and the fact that the entire Gulf remains the CGSA.

The Commission's failure to take into consideration the unique characteristics that Gulf-based CTS providers must deal with in providing cellular service in the Gulf has created a stalemate between the land-based carriers, with their inability to properly serve their land markets because of the prohibition against de minimis extensions into the Gulf and the Gulf-based carriers, with their inability to properly serve the coastal waters of the Gulf because of the prohibition against their locating cell sites on land. The challenge for the Commission is how to relieve these two problems in a manner that recognizes the difficulties to Gulf carriers caused by the unique characteristics of the Gulf and best serves the demand for cellular service in the coastal waters of the Gulf.

It is beyond question that the unique characteristics of providing CTS in the Gulf were the most significant considerations for the Court in remanding to the Commission the instant matter. The Court explicitly stated three key considerations in reaching its decision. First, the Court recognized that the Gulf carriers' CTS coverage is dependent upon availability of the waterborne platforms of oil and gas companies and that when those platforms are mover, the

Gulf carriers must relocate their facilities.⁵⁰ Thus, the Court concluded that “the territorial coverage of GMSA licensees inevitably fluctuates and is regionally limited to areas of current oil or gas exploration.”⁵¹ Second, the Court expressed its clear understanding that the Gulf carriers were placed in this position “[b]ecause FCC regulations do not permit licensees in the GMSA to build towers on land.”⁵² Third, the Court noted that “[a]s of January, 1992, the FCC had granted land-based licensees in Texas, Louisiana, Mississippi, Alabama, and Florida approximately sixteen contour extensions into the shoreline waters of the GMSA” under the de minimis exception to its rules that did not require Coastel or PetroCom consent.⁵³ At the same time, the Court noted, the Commission would not grant the Gulf carriers a de minimis contour extension into adjacent land CTS markets without the consent of the affected co-channel land-based counterpart.⁵⁴

As described below, the Commission’s proposal flies in the face of these considerations that were crucial to the Court’s remand.

⁵⁰Petroleum Communications, Inc. v. FCC, 22 F.3d at 1168.

⁵¹Id.

⁵²Id.

⁵³Id. at 1168-1169.

⁵⁴Id. at 1169.

1. The Commission's Proposals Will Gradually Replace Gulf-Based Service To The Coastal Zone With Land-Based Service.

As the Court emphasized, "[t]he Commission itself recognized the significant differences between land-based and Gulf-based licensees prior to the instant rulemaking when it permitted Gulf-based licensees to define their service areas by reference to the entire Gulf of Mexico."⁵⁵

The Gulf has been treated differently in large part because there are no permanent population centers in the Gulf, with service being provided largely to offshore oil rigs and boating traffic. . . . Another reason for different treatment of Gulf cellular systems has been the inability of Gulf carriers to locate antenna towers on land to serve Gulf areas because of the potential for interference caused to land systems.⁵⁶

The Commission's proposal fails to address the Court's concern that such differences warrant different regulatory treatment.

Under the Commission's proposal, any part of the Coastal Zone currently served by a Gulf CTS carrier would remain part of that carrier's CGSA unless and until it ceased to provide service to that part. Gulf carriers could not expand their cellular service to any other part of the Coastal Zone unless the desired area was "unserved," that is at least 50 square miles

⁵⁵Id. at 1172-1173.

⁵⁶Id. at 1173 (quoting Amendment of Part 22 of the Commission's Rules, Further Notice of Proposed Rulemaking, 6 FCC Rcd at 6159; see also Petroleum Communications, Inc., Memorandum Opinion and Order on Reconsideration at ¶ 13 n.16 ("[d]ue to the unique situation presented by using cellular technology to serve the Gulf . . . "; Petroleum Communications, Inc., Memorandum Opinion and Order at ¶ 11 ("We find that identification of cellular antenna locations in a body of water such as the Gulf of Mexico constitutes a unique situation . . . ").